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After Richmond Newspapers: A Public Right to Attend Civil Trials

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After *Richmond Newspapers*: A Public Right to Attend Civil Trials?

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I
Introduction

The 1980 United States Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*[1] is of major potential importance to the press and to the continuing development of First Amendment[2] law. For the first time in history,[3] the Supreme Court declared that the public and press have a First Amendment right to attend criminal trials.[4] *Richmond* largely neutralized the decision of *Gannett Co. v. DePasquale*,[5] which was interpreted by many critics as an indication that the Court would soon condone the closure of an ever-increasing number of trials to the public and the press.[6] *Richmond* thus represented a major victory for the press, whose triumphs in recent years have frequently been offset by serious defeats.[7] One such defeat came over a year and a half after *Richmond*, when the Supreme Court denied certiorari in *Cox Enterprises, Inc. d/*

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1. 448 U.S. 555 (1980).

2. U.S. CONST. amend. I.

3. The significance of *Richmond* was recognized by Justice Stevens in his concurring opinion: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever." 448 U.S. at 582 (Stevens, J., concurring).

4. 448 U.S. at 580.

5. 443 U.S. 368 (1979). *Gannett* held that the Sixth Amendment (U.S. CONST. amend. VI) did not give the public a right of access to pre-trial supression hearings. 443 U.S. at 384.

6. *See, e.g.*, *Media Opposes Secrecy*, NEWS MEDIA & THE LAW, Aug./Sept. 1979, at 4.

7. In addition to *Gannett*, examples of past Burger Court decisions where the press lost major Constitutional battles include: Herbert v. Lando, 441 U.S. 153 (1979); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Houchins v. KQED, Inc., 438 U.S. 1 (1978). Recent instances where the press has prevailed on important First Amendment issues include: Chandler v. Florida, 449 U.S. 560 (1981); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

b/a Lufkin News v. Vascocu[8], a case involving the closure of pre-trial proceedings in a civil suit.[9] This mixed First Amendment record has led many to criticize the Burger Court for its inadequate protection of the press.[10] Nevertheless, the *Richmond* decision was welcomed relief for the press and its supporters.

One issue left unresolved by the *Richmond* decision, though, is whether the public right of access it established applies to civil as well as criminal trials.[11] The doubts created by this open question that remained following *Richmond* were only increased by the Court's more recent refusal to hear the *Lufkin News* case.[12] An answer to this question is urgently needed since the uncertain state of present law is unsatisfactory to both the press desiring trial access and individual litigants desiring a closed trial in order to satisfy what they feel to be legitimate concerns. Although most civil trials have been, and undoubtedly will continue to be, open to the public and press,[13] certain types of civil proceedings have in the past often been closed, particularly where family law matters are involved.[14] *Richmond* leaves the public, press, judiciary, and legal profes-

8. 102 S. Ct. 1622 (1982) (No. 81-1154).

9. *Lufkin News* involved a shareholders' derivative suit brought in a Texas state court against a local bank. On August 3, 1981, Judge Vascocu granted a defense motion to close the courtroom to everyone but those directly interested in the case. In so doing, the judge reportedly stated: "This is a highly sensitive matter, and there will be some decisions made here the public wouldn't particularly understand." San Francisco Chronicle, Mar. 2, 1982, at 8, col. 4.

While the Supreme Court's refusal to grant certiorari added no precedential value to the Texas court's actions (Agoston v. Pennsylvania, 340 U.S. 844 (1950)), *Lufkin News* was a "defeat" in a more general sense, since it leaves judges with the power to exclude the press from the courtroom under similar circumstances and conversly leaves the press and public in doubt as to their rights in opposing such orders.

10. *See generally* Goodwin, *Press-Court Relations: Can They Be Improved?*, 7 HASTINGS CONST. L.Q. 633 (1980).

The Supreme Court's refusal to hear the *Lufkin News* case prompted Joe Murray, editor and publisher of the Texas newspaper that sought review, to state that the action left "quite a legal loophole in our liberty." San Francisco Chronicle, Mar. 2, 1892, at 8, col. 4.

11. The plurality opinion deliberately skirted this issue: "Whether the public has a right to attend trials of civil cases is a question not raised by this case . . . ." 448 U.S. at 580 n.17.

12. The significance of the Court's action in the *Lufkin News* case was recognized by Jack Landau, an official of the Reporters Committee for Freedom of the Press: "Up to now, the whole debate has had to do with closing courtrooms in cases of criminal defendants." San Francisco Chronicle, *supra* note 9.

13. See notes 54-78 and accompanying text, *infra*.

14. See notes 168-98 and accompanying text, *infra*.

sion in the dark as to whether the public and news media are entitled to attend this type of sensitive civil proceeding. Conversely, while trial closure may serve legitimate individual and social needs in these cases, the continued authority of a trial judge to expel the public from the courtroom is brought into serious doubt by the *Richmond* decision. An adequate clarification of these issues would simultaneously promote the important public interests recognized by the *Richmond* Court as served by open trials[15] and aid individual litigants by clearly delineating those exceptional circumstances in which they may reasonably demand trial closure.

This note will discuss the issues underlying the question of whether the public and press should have a constitutional right to attend civil trials and will offer a prediction as to whether the Court, if faced with the issue, will expand the First Amendment right to attend civil trials. The possible impact of such a decision will also be examined. In reaching answers to these larger questions, this note will first analyze the *Richmond* decision, examining the basis for and reasoning behind the public's right to attend. The history of open civil trials will be briefly discussed and comparisons will be made to the parallel history of public criminal trials. An examination of the current constitutional, statutory, and common law statuses of the public civil trial will follow. The major issues involved in the public trial controversy will then be analyzed. Particular attention will be given to issues raised in *Richmond* and earlier decisions which have special significance in the context of civil trials due to inherent differences between civil and criminal trials. It will be shown that the rationale of the *Richmond* decision, the common law tradition of public civil trials, and the contemporary interests served by public trials are likely to compel the Court to create a First Amendment right to attend civil trials. This note will explore the possible impact of such a right, including an examination of traditional exceptions to the public trial rule and how these exceptions may be altered. Specific state rules authorizing trial closure will be discussed and their continued validity will be questioned. This note will not deal with the special issues raised by the presence of electronic broadcast media in the courtroom[16] or with the issues

15. See discussion pp. 8 & 17-19, *infra*.

16. The "press" as used in this note is to be understood as referring to the most unobtrusive of reporters, without cameras or other potentially disruptive equipment.

involved in press and public access to pre-trial proceedings[17] or court records.[18] Following the lead of the Supreme Court, this note will treat the general public and the press as having an equal right to attend trials; the note will not consider whether the courts should recognize a superior right of access for the press.[19]

II
Richmond Analyzed

It is not easy to decipher the exact legal rules established by *Richmond*. The seven-to-one decision[20] contains a total of six opinions, with only two justices[21] joining Chief Justice Burger in the plurality opinion. A considerable amount of "head counting" is therefore necessary to determine exactly what propositions *Richmond* sets forth.[22]

The main issue to be considered here is, following *Richmond*, under what circumstances the Court is likely to find that a reporter has a right to attend and quietly observe a civil trial. This is not to say that courtroom disruption by the press will not be discussed at all—only that it will not be dealth with in any depth. For a discussion of the special problems involved with broadcast media activity in the courtroom, see Chandler v. Florida, 449 U.S. 560 (1981); Estes v. Texas, 381 U.S. 532 (1965); Note, *From Estes to Chandler: The Distinction Between Television and Newspaper Trial Coverage*, 560 COMM/ENT L.J. 503 (1982).

17. *Gannett* made it clear that the issues raised when the public and press seek access to criminal pre-trial proceedings are significantly different from those raised when access is sought to the trial itself. 443 U.S. at 389-91. Access to civil pre-trial proceedings may also raise different issues which are beyond the scope of this note.

18. *See generally* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

19. While the *Richmond* plurality did not reach the issue of whether the press enjoys any greater right of access than the general public, it did acknowledge the important role played by the press in past trial coverage:

> "While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system . . . .'" 448 U.S. at 573.

(quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976)) (Brennan, J., concurring).

20. Justice Powell took no part in the decision (448 U.S. at 581) and Justice O'Connor had not yet joined the court.

21. Justice White and Justice Stevens. Both Justices also wrote their own concurring opinions. *Id.*

22. A total of five Justices joined the two opinions written by Chief Justice Burger and by Justice Brennan (who was joined by Justice Marshall). 448 U.S. 584-98. Any points on which these two opinions expressly agree therefore represents a view held by a majority of the current Court. A five Justice majority can also be reached whenever views expressed in both the concurring opinion written by Justice Stewart (*Id.* at 598-601) and that written by Justice Blackmun (*Id.* at 601-04) agree with those ex-

The basic holding of the plurality opinion was that, absent an overriding interest, criminal trials must be open to the public and press.[23] The constitutional basis of the plurality's decision was that the public trial "is implicit in the guarantees of the First Amendment."[24] The First Amendment was said by the plurality to guarantee a right of access because "[f]ree speech carries with it some freedom to listen"[25] and because of the "affinity" of the public trial to the right of assembly.[26] The plurality relied heavily on the historic common law tradition of the public trial as a justification for its decision.[27] The Court further justified the open trial by finding that a public criminal trial helps ensure the fairness of the proceedings,[28] serves "an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion,"[29] and functions to educate the public about the workings of their judicial system, helping to secure public understanding of, and confidence in, that institution.[30] However, the plurality opinion stated that the right of access is not absolute and that overriding interests may compel trial closure.[31]

The concurring opinion written by Justice Brennan and joined in by Justice Marshall agreed that the First Amendment guarantees a public right to attend,[32] but discussed the holding in the broader context of the public right of access to information in general. This opinion emphasized the "structural role" played by the First Amendment in fostering the informed public debate "necessary for a democracy to survive."[33] Justice

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pressed in the plurality opinion. Additional nuances are added by the concurring opinions of Justices White and Stevens and by the dissenting opinion of Justice Rehnquist.

23. 448 U.S. at 581.

24. *Id.* at 580.

25. *Id.* at 576.

26. *Id.* at 577.

27. *Id.* at 564-69.

28. *Id.* at 569.

29. *Id.* at 571.

30. *Id.* at 571-73.

31. *Id.* at 581-82 n.18. The plurality did not delineate any specific circumstances in which a trial might still be closed, stating that, "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public . . . ." *Id.* However, the plurality later suggested that courtroom disruption by the public might require trial closure. *Id.* See notes 133-34 and accompanying text, *infra*, for a discussion of this problem. The plurality also suggested that a limit be placed on public access when there is insufficient room in the courtroom and that preferential treatment might be given to the press under these circumstances. *Id.*

32. *Id.* at 585.

33. *Id.* at 587-88.

Brennan, like Chief Justice Burger, relied on the historical openness of Anglo-American trials in reaching his conclusions.[34] The opinion also discussed the political purposes served by the public trial,[35] many of which were also set forth in the plurality opinion.[36]

The concurring opinion written by Justice Stewart briefly expressed his agreement that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves . . . ."[37] Justice Stewart stated that this right also included access to civil trials.[38]

The concurring opinion written by Justice Blackmun approved of the other justices' reliance on history as a ground for their decisions.[39] Justice Blackmun was critical of the plurality's constitutional analysis, however, and strongly reasserted his position expressed the previous year in *Gannett*[40] that the public's right to attend a criminal trial is to be found in the Sixth[41] rather than the First Amendment. He finally was "driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial."[42]

Like Justice Blackmun,[43] Justice White in his concurring opinion, restated his position in *Gannett*,[44] that the Sixth Amendment forbids closure of criminal proceedings "except in narrowly defined circumstances."[45] In his concurring opinion, Justice Stevens stressed the importance of the *Richmond* decision[46] and stated that it stands for the broad proposition "that an arbitrary interference with access to important information

34. *Id.* at 589-93.

35. *Id.* at 593-97.

36. Both the concurring opinion written by Justice Brennan and the plurality opinion stated that the open trial plays a role in assuring fairness. Both opinions also asserted that an open trial serves to build public confidence in our method of administering justice. See discussion notes 80-94 and accompanying text, *infra*.

37. *Id.* at 599.

38. *Id.*; see note 157 and accompanying text, *infra*.

39. *Id.* at 601.

40. 443 U.S. at 406 (Blackmun, J., joined by White, Marshall, and Brennan, JJ., concurring and dissenting in part); 448 U.S. at 603.

41. U.S. CONST. amend. VI.

42. See text accompanying notes 39-42, *supra*.

43. 448 U.S. at 604.

44. 443 U.S. at 406 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring and dissenting in part).

45. 448 U.S. at 581-82.

46. *Id.* at 582.

is an abridgment of the freedoms of speech and of the press protected by the First Amendment."[47]

Dissenting Justice Rehnquist argued vehemently that there was no constitutional basis for review of the trial judge's decision to close the trial, asserting that the Court lacked authority to interfere with the manner in which the state court chose to administer justice.[48]

In summary, the majority in *Richmond* ruled that the First Amendment requires criminal trials normally be open to the public.[49] A majority also indicated that this right is qualified in some way,[50] although the issue of which particular circumstances might still compel trial closure was not reached.[51] Most of the justices based the right of access largely on the historical tradition of public trials.[52] Three of the justices viewed this issue as an aspect of the larger issue of access to governmental information and processes.[53] This note will attempt to determine if the Court is likely to extend *Richmond* to include civil trials, should the justices choose to hear a case raising this issue.

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47. *Id.* at 583. In this respect, Justice Stevens is close to the views of Justices Brennan and Marshall who, in their concurring opinion, considered the open trial issue to be part of the larger access to government information issue. *See id.* at 585-89.

48. *Id.* at 606.

49. Seven of the eight Justices who considered the case took this view. *Id.* at 580 (Burger, C.J., White, Stevens, JJ.); *id.* at 585 (Brennan & Marshall, JJ., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring). Although Justice Powell took no part in the *Richmond* decision, in *Gannett* he expressed the view that the First Amendment extends protection to at least a limited right of access to pre-trial suppression hearings. 443 U.S. at 397-403. Had he participated in *Richmond*, Justice Powell probably would have found the same right to attend criminal trials.

50. 448 U.S. 581 n.18 (Burger, C.J., White & Stevens, JJ., judgment of the Court); *id.* at 600 (Stewart, J., concurring).

51. See note 31 and accompanying text, *supra*.

52. 448 U.S. at 564-69 (Burger, C.J., White & Stevens, JJ.); *id.* at 589-93 (Brennan & Marshall, JJ., concurring); *id.* at 601 (Blackmun, J., concurring).

53. See notes 32 & 47 and accompanying text, *supra*. The plurality opinion dismissed the importance of this view, stating that the way the open trial issue was labelled was "not crucial." 448 U.S. at 576. The perspective and analytic framework reflected in the concurring opinions written by Justices Stevens and Brennan is of potential importance for other purposes. Unequivocal establishment of an overall right of public access to government information and processes or of a "right to know" might have a tremendous social impact by influencing the manner in which government business is conducted. The creation of a right to know would also seem to dictate that civil trials be presumptively open. *See generally* Casenote, *Is the Right of Access to Trials an Instance of a First Amendment Right to Know? Richmond Newspapers v. Virginia*, 42 OHIO L.J. 831 (1981); O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980).

III
History of the Public Civil Trial

Given its importance in the *Richmond* Court's reasoning,[54] it is likely that a historical analysis will also play an important role in the determination of whether to extend the right to attend to include civil trials. Many of the sources cited by the Court in *Richmond* as proof of the tradition of public criminal trials provide equal support for the position that civil trials have been traditionally public throughout English and American history. The *Richmond* Court noted that the public character of the early English courts indicates the antiquity of the open criminal trial.[55] These judicial entities, including the Eyre of Kent and the county, hundred, private and King's courts, were courts of general jurisdiction, hearing what would today be considered civil as well as criminal matters.[56] The public nature of these proceedings therefore provides a strong indication that there is as longstanding a history of open civil trials as there is of open criminal trials.[57]

In its historical analysis, the *Richmond* Court also cited many noted jurists and historians who have commented on the importance of the public trial in English history.[58] Lord Coke

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54. See note 52, *supra*.

55. *Id.*

56. Chrimes, *Introductory Essay* to I.W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 8, 13, 265. (7th ed. 1956). The distinctions between civil and criminal matters were not as clear in the early English courts as they are today. *See* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 38 (2nd 3d. 1898), where it is stated:

> [T]here is no perceptible difference of authorities or procedure in civil and criminal matters until, within a century before the [Norman] Conquest, we find certain of the graver public offences reserved in a special manner for the king's jurisdiction.

57. *See* Chrimes at 6, 9, 268. In reference to hundred courts, Chrimes states:

> When visible in the light of documentary evidence, these courts showed many features of ancient popular assemblies, meeting in the open air at regular intervals of four weeks, their judgments those of peasant suitors . . . .

The county courts were also public:

> The large number of persons, suitors, parties, jurors, officials and others concerned in a meeting of a county court is a striking feature . . . ." *Id.* at 6.

Attendance by tenants at the "private courts" conducted by large landholders was compulsory. F. POLLOCK & F. MAITLAND, *supra* note 56, at 43. See note 59, *infra*, regarding the public character of the "Kings Courts."

58. 448 U.S. at 564-73, 589-91. One such writer made the following sweeping statement:

> It is one of the most conspicuous features of English justice that all judicial trials are held in open court, to which the public have free access . . . .
> The former appears to have been the rule in England from time immemorial,

went so far as to suggest that the very word "court" implies an open proceeding.[59] Coke and the other writers quoted in *Richmond* did not differentiate between civil and criminal matters in their comments on the open trial tradition. Given the general nature of early English courts,[60] though, there is no reason to believe their sweeping statements were not meant to encompass civil as well as criminal trials.

The authorities cited in *Richmond* in support of the Court's finding of an early American tradition of open criminal trials also provide evidence that civil trials were public events in the earliest days of the American colonies.[61] The early rules of the colonial governments either expressly provided that criminal and civil trials were to be public[62] or made more broad statements that all courts were to be "open."[63] In accord with the law of early America, an overwhelming number of contemporary American courts and legislatures have recognized the

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> and much of the effectiveness of English public opinion . . . may be said to be due to it. Only in rare instances, of which the notorious Court of Star Chamber is the most conspicuous, has the rule been violated; and the unpopularity of such exceptions is the best proof of the value attached by the nation to the general rule.

E. JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th ed. 1967).

59. 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND, SECOND PART 103. Lord Coke wrote:

> These words [In curia dimini regis] are of great importance, for all causes ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, whither all persons may resort; and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court, where the parties councell and attorneys attend, ought orders, rules, awards, and judgements to be made and given, and not in chambers or other private places, where a man may lose his case, or receive great prejudice, or delay in his absence for want of defence. Nay, that judge that ordereth or ruleth a cause in his chamber, though his order or rule be just, yet offendeth he the law, (as here it appeareth) because he doth it not in court.

60. *See* note 56, *supra*.

61. 448 U.S. at 567-68.

62. *See, e.g.*, the 1677 Concessions and Agreements of West New Jersey, *reproduced in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129 (1971).

63. *See, e.g.*, the Pennsylvania Frame of Government of 1682 and the Massachusetts Body of Liberties of 1641, *id.* at 140, 72.

The word "open" in this context is subject to at least two different interpretations. These early rules may have been intended merely to secure a potential *litigant's* right of access to the courts—that is, to bestow on all members of the public a right to have their particular cases heard by the courts. On the other hand, "open" may also be understood to mean that the public has a right to attend all proceedings of the courts. By citing the above authorities in support of its finding of a historical tradition of public criminal trials, the *Richmond* Court apparently gave its approval to the latter interpretation. 448 U.S. at 568.

common law tradition of public civil trials. Many states have expressly adopted the common law tradition by providing for public trials in their constitutions,[64] statutes or rules of court.[65] The state courts have acknowledged the public civil trial tradition everywhere that the issue has been raised.[66] Even before *Richmond*, the United States Supreme Court acknowledged this tradition.[67] Finally, the plurality opinion in *Richmond* also explicitly recognized the historical tradition of open civil trials:

> "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."[68]

IV
Competing Interests in the Open Trial Controversy

History alone, however, will not determine whether a First Amendment right to attend civil trials will be established: other issues will influence the outcome of this question. Simi-

64. *See, e.g.*, ARIZ. CONST. art. 2, § 11; DEL. CONST. art. 1, § 9; N.C. CONST. art. I, § 18; OR. CONST. art. I, § 10; WASH. CONST. art. 1, § 10.

65. *E.g.*, ARIZ. R. CIV. P. ANN. 77(d); ARK. STAT. ANN. § 22-109 (1962); CAL. CIV. PROC. CODE § 124 (West 1954); IDAHO R. CIV. P. ANN. 77(b); IOWA CODE ANN. § 605.16 (West 1975); KAN. CIV. PROC. CODE ANN. § 60-104 (Vernon 1976); ME. R. CIV. P. ANN. 77(b); MICH. COMP. LAWS ANN. § 600.1420 (1981); MINN. R. CIV. P. 77.02; MO. ANN. STAT. § 510.200 (Vernon 1979); NEB. REV. STAT. § 24-311 (1975); NEV. R. CIV. P. 77(b); N.Y. JUD. LAW § 4 (McKinney 1968); UTAH CODE ANN. § 78-7-3 (1953); WASH. CT. R. ANN., CIV. RULE 77(j). Most states also provide for certain exceptions to the general public trial rule. See text accompanying notes 167-85, *infra*.

66. *See, e.g.*, Cembrook v. Sterling Drug, Inc., 231 Cal. App. 2d 52, 41 Cal. Rptr. 492 (1964); Lecates v. Lecates, 190 A. 294 (Del. Super. Ct. 1937); State *ex rel.* Gore Newspapers Co. v. Tyson, 313 So. 2d 777, 783 (Fla. Dist. Ct. App. 1975), English v. McCrary, 348 So. 2d 293 (Fla. 1977); Des Moines Register & Tribune Co. v. Hildreth, 181 N.W.2d 216 (Iowa 1970); Raper v. Berrier, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1954); Cohen v. Everett City Council, 85 Wash. 2d 385, 535 P.2d 801 (1975). Some state courts, while recognizing the tradition of open civil trials, have approved of closure by the trial judge, either on the basis of a statute or under a judge's inherent power to control the conduct of the trial. *See* Bloomer v. Bloomer, 197 Wis. 140, 221 N.W. 734 (1928).

67. A statement from Craig v. Harney, 331 U.S. 367, 374 (1947) is often quoted in the cases dealing with the public trial issue: "A trial is a public event. What transpires in the court room is public property." Both the majority and the dissenters acknowledged the tradition of public civil and criminal courts in *Gannett*. 443 U.S. 368. Justice Stewart, in the Opinion of the Court, stated: "For many centuries, both civil and criminal trials have traditionally been open to the public." *Id.* at 386, n.15. The dissenting opinion written by Justice Blackmun stated: "[T]here is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history." *Id.* at 420.

68. 448 U.S. at 580 n.17.

lar kinds of issues arise in both the civil and criminal context when the effects of public attendance are analyzed. The public and press can influence the judge, jury, attorneys, parties, and witnesses in both types of proceedings.[69] The parties to a civil suit and criminal defendants all have an interest in receiving a fair trial and in preserving as much of their personal privacy as possible.[70] The public also has some degree of interest in fair and orderly judicial administration in both kinds of trials.[71] However, the "People" or the "State" is always a *party* to a criminal trial, giving the public and press a direct and manifest interest in all criminal matters.[72] Except where a governmental unit is involved, or in certain exceptional cases,[73] the public's interest in civil litigation is generally not as direct or obvious.

The more direct public interest in criminal cases is reflected by the relative amounts of press coverage given criminal and civil matters and in the relative degree of public awareness of and concern about the two kinds of proceedings. It is a rare television news broadcast that does not report on a crime or a criminal justice proceeding, but news of civil controversies appears less frequently.[74] As a general rule, public feelings run higher when a crime has been committed than when a contract has been breached or tort liability incurred. Revealingly, the great majority of cases involving the public trial controversy have arisen in the criminal, rather than civil, context.[75] Thus, while many of the issues regarding public attendance at trial

69. *See, e.g.*, State *ex rel.* Gore Newspapers Co. v. Tyson, 313 So. 2d at 781-87; Lorenz v. Nuclear Regulatory Comm'n, 516 F. Supp. 1151 (D. Colo. 1981).

70. See note 69, *supra*.

71. See note 69, *supra*.

72. In this regard, Blackstone stated: "Public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1428 (Lewis ed. 1897).

73. See note 90, *infra*.

74. This is not to say that some kinds of civil proceedings do not make national headlines. The various school desegregation cases are a notable example, but were also unusual in the number of people directly affected by the outcome of the decisions.

75. While there are some state cases which deal with the open trial issue in regard to a civil proceeding (see note 66, *infra*), these are far outnumbered by the criminal cases which involved litigation of this issue. No United States Supreme Court decision has directly addressed this issue in regard to a civil trial. This prompted one commentator to state in regards to the *Lufkin News* case, 102 S. Ct. 1622, that "up to now, the whole debate has had to do with closing courtrooms in cases of criminal defendants." Jack Landau, official of the Reporters Committee for Freedom of the Press, San Francisco Chronicle, Mar. 2, 1982, at 8, col. 4.

initially appear to be identical in either context, the degree and nature of public and press concern with criminal trials may be so different from their concern with civil trials that their interests in the two types of judicial proceedings are qualitatively different. In analyzing the various interests involved, the discussion below will attempt to determine whether these differences are so fundamental that a result different from *Richmond* would be reached in a case raising the question whether the public and press have a right to attend civil trials.

The open trial question can be analyzed in terms of competing and conflicting interests. The *Richmond* Court took the familiar approach of balancing these interests before reaching its decision.[76] A similar balancing approach will undoubtedly be used in evaluating whether the public has a right to attend civil trials. The Court is, of course, only compelled to balance those interests which are fundamental, i.e., protected by some clause of the Constitution, against other such fundamental rights. The competing interests involved can be categorized as "public" and "individual" interests.[77] Generally, open trials promote public interests, while closed trials protect certain individual interests. Although this analysis is an oversimplification of the issues,[78] it serves as a good starting point and

76. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 824 (1974); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

77. While this note usually treats the interests of the public and the press as one and the same, they will not always be identical. For example, most people have no interest in what the profits or losses of a newspaper publisher are and, contrary to the public's interest in accurate information, a television newsstaff may produce a distorted account of an event when a sensationalized story will produce higher ratings. However, the courts have generally chosen to view the press as servants of the public. *See* 100 S. Ct. at 2832-33 n.2 (Brennan & Marshall, JJ., concurring); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting). *cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). This note will follow the general trend and treat the interests of the public and press as largely identical as far as the open trial issue is concerned.

78. This analysis is oversimplified in at least three ways. First, it groups together under the term "public interests," those of the press and the public. See note 77 *supra*. Second, this analysis ignores independent state interests which may be important in some circumstances. For example, it will be seen below that trial closure may promote the states' interest in the welfare of children or in preserving marriages. See notes 179 & 190, *infra*. When these state interests are shared by the public—as they frequently will be—an additional level of complexity arises; the public itself may have some interests which may be served by closed trials. Finally, this analysis is oversimplified in viewing the public and individual interests as conflicting. It will be seen below that this is not always the case. See note 96 and accompanying text, *infra*. Individual and public interests clearly can overlap and each can occasionally be served by both open and closed trials.

framework for understanding the public trial controversy.

A. Public Interests

The public interests served by an open civil trial are similar to those served by an open criminal trial. Past decisions and legal writers have recognized that open trials serve public interests by ensuring that the judicial process remains fair and honest and by contributing to vital and informed debate on important social issues.[79] The lesser degree of concern that the public generally has with routine civil cases does not mean that these interests would not be furthered to some degree by a public right to attend civil trials.

1. *The Public Interest in Fair Trials*

The courts have recognized that the public, like the individual litigant, has an interest in maintaining a fair and honest judicial system for the resolution of disputes.[80] Observation of the fair and orderly administration of justice helps to maintain public faith in an important aspect of government and in the law generally.[81] Thus, the way in which *all* trials, civil and criminal, are conducted "is preeminently a matter of public interest."[82]

The authorities have argued that public trials, both civil and criminal, can assure the fairness and honesty of the judicial process in several ways.[83] Public scrutiny has long been seen as an important means of discouraging abuses of judicial power.[84] Public exposure of a tyrannical or incompetent judge may, in theory at least, lead to his removal.[85] Public and press

79. See authorities cited note 66, *supra*.

80. *See Richmond*, 448 U.S. at 594 (Brennan, J., concurring). "For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity . . . mandates a system of justice that demonstrates the fairness of the law to our citizens." *See also In re* Murchison, 349 U.S. 133, 136 (1955).

81. 448 U.S. at 569-73.

82. *Id.* at 596 (Brennan, J., concurring).

83. See notes 96-134 and accompanying text, *infra*, for a discussion of the ways in which an open trial may lead to unfairness.

84. *See, e.g., In re* Oliver, 333 U.S. 257, 270 (1948).

85. The official methods for the removal of judges, such as impeachment, have often been ineffective for the control of the judiciary. Other means have thus been developed, such as investigating commissions. *See* Note, *Peeking Behind Judicial Robes: A First Amendment Analysis of Confidential Investigations of the Judiciary*, 2 COMM/ENT L.J. 707, 708-10 (1980) [hereinafter cited as "Note, *Behind Judicial Robes*"].

presence in the courtroom is thought to assure that judges remain honest and continue to perform at the highest level of competence.[86]

Commentators and courts have also argued that public trials can aid in obtaining accurate testimony from all possible witnesses.[87] Publicity of the events or issues raised at trial may cause more witnesses to come forward by notifying such persons of the pending proceedings.[88] Witnesses testifying at a trial where the public is present may be deterred from lying for fear that someone who hears their testimony can expose their perjury.[89]

2. *The Public's Interest in Informed Debate*

Although criminal trials in the past have drawn a large amount of public attention more frequently than have civil trials, some civil actions have great significance for much of society.[90] Major class action suits, anti-trust actions, shareholder derivative suits, and personal injury litigation involving widely-used products are frequently of interest to large numbers of people. Where civil trials involve such important social issues, a public trial can serve the need for public debate which is essential for the effective operation of the democratic process.[91] Publicity of the facts demonstrated and the arguments raised at trial arguably helps ensure that members of the public are informed and thus better able to make intelligent deci-

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86. *See* GOODWIN, *supra*, note 10, at 641.

87. But see notes 122-32 and accompanying text, *infra*, for the ways in which open trials have been understood as having an undesirable effect on testimony. In addition to having a general interest in the fair administration of justice, some members of the public may have a more direct interest in accurate and complete witness testimony, since, as Justice Brennan stated in *Richmond*, "mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant." 448 U.S. at 596.

88. *Id.* at 596-97; United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969); 6 J. WIGMORE, EVIDENCE IN TRIALS IN COMMON LAWS § 1834 (3rd ed. 1940).

89. 448 U.S. at 596.

90. Gannett Co. v. DePasquale, 443 U.S. at 386-307 n.15. The majority opinion states:

> [M]any of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process is often of interest only to the parties in the litigation, this is not always the case. [citing Dred Scott v. Sandford, 60 U.S. 393 (1856); Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education, 347 U.S. 483 (1954); Regents of the University of California v. Bakke, 438 U.S. 265 (1978)] Thus, in some civil cases the interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

91. *See generally*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

sions when exercising their right to self-government. Also, when the government itself is a party to a civil suit, the public has a strong interest in the way the case is managed and in the positions taken on the public's behalf.

The *Richmond* Court recognized that these kinds of interests merit constitutional protection under the First Amendment freedom of press and speech clauses, declaring that "[t]hese expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[92] These interests may also be protected by the First Amendment right of assembly, both in its function "as a catalyst to augment the free exercise of the other First Amendment rights . . ."[93] and as an independent right to gather for any lawful purpose in a public place such as a courtroom.[94]

B. Individual Interests

Balanced against the public interests promoted by open trials are numerous individual interests that tend to be advanced by closed trials. Where these latter interests conflict with those of the public, the stronger interests may determine the outcome of the open trial issue.

The interests of the individual litigant include his interest in a fair trial, privacy, and, occasionally, secrecy.[95] While trial closure may in some circumstances be necessary to protect these interests, some alternatives have been developed by the courts. However, only constitutionally protected individual interests can outweigh the constitutionally protected public interests promoted by public trials.

1. *The Litigant's Interest in a Fair Trial*

Normally, one of the litigant's foremost concerns is that he receive a fair trial.[96] Fairness is a fundamental right protected

92. 448 U.S. at 575.

93. *Id.* at 577.

94. *Id.* at 578.

95. See text accompanying notes 96-155, *infra*.

96. The conflict in this area of the law has been traditionally expressed as being between fair trial and free press. *E.g.*, Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391 (1968). However, press access to the courtroom does not always conflict with the interest of the parties in a fair trial, and may in some circumstances serve that interest. *See, e.g.*, AMERICAN

by the due process clause of the Fourteenth Amendment.[97] Public access has traditionally been understood to conflict with this general interest by threatening the litigant's ability to obtain: (1) an unbiased jury, (2) an unbiased judge, (3) effective counsel, (4) accurate testimony from all available witnesses and (5) a courtroom free of disruption.[98]

In the criminal cases, defendants have been able to obtain new trials on due process "fairness" grounds only where public and press impact on the trial was extreme.[99] The defendant is required to show some "identifiable prejudice" or that the trial court followed procedures that involved such a high probability that prejudice would result that the trial is "deemed inherently lacking in due process."[100] The civil litigant has fewer constitutional protections[101] and may have to overcome some obstacles before his due process arguments will be heard.[102] Thus, the degree of press and public effect on the trial may have to be even greater before retrial of a civil suit will be required.

a. The litigant's interest in an unbiased jury: Although civil trials generally have not attracted the same amount of press coverage as have some celebrated criminal trials,[103] the possibility exists that a civil jury might be prejudiced by media cov-

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NEWSPAPER PUBLISHERS ASS'N, FREE PRESS AND FAIR TRIAL (1967). See also text accompanying notes 80-89, *supra*.

97. U.S. CONST. amend. XIV. Application of the due process clause to all criminal cases is required by the language of the clause when applied to the nature of criminal actions: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." *Id. See also* U.S. CONST. amend. V. The Supreme Court has also invoked the due process clause to oversee the fairness of a wide variety of non-criminal hearings. *E.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (hearing prior to suspension of a student); Fuentes v. Shevin, 407 U.S. 67 (1972) (hearing prior to a creditor's repossession of goods); Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing prior to termination of welfare benefits). Unlike the automatic availability of the due process clause to a criminal defendant, a civil litigant apparently must first show that deprivation of a "liberty" or "property" interest is involved before the due process clause may be invoked. Board of Regents v. Roth, 408 U.S. 564 (1972). While such a showing would not be difficult in the great majority of civil actions, at least for defendants, the sporadic application of the due process clause in non-criminal matters leaves the constitutional status of a civil litigant's fairness claims somewhat uncertain.

98. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).

99. See note 98, *supra*. *Cf.* Murphy v. Florida, 421 U.S. 794 (1975).

100. Estes v. Texas, 381 U.S. at 542-43.

101. Criminal defendants only are protected by many of the clauses of the Fifth, Sixth, and Eighth Amendments. U.S. CONST. amend. V, VI, VII.

102. See note 97, *supra*.

103. *E.g.*, Sheppard v. Maxwell, 384 U.S. 333.

erage[104] or by the mere presence of an emotional and biased crowd in the courtroom.[105] Analytically, this issue is much the same whether the context is a civil or criminal trial, and was addressed in *Richmond* and earlier Supreme Court decisions.[106] The Court in *Richmond* concluded that a criminal trial should not be closed in order to prevent jury prejudice if alternative methods are available to shield the jury from prejudicial information.[107] The Court in *Sheppard v. Maxwell*[108] set forth some alternatives to trial closure, including continuance, change of venue, sequestration of the jury, and orders prohibiting counsel or other officers of the court from releasing prejudicial information to the press.[109] The Court in *Nebraska Press Association v. Stuart*[110] discussed alternatives to prior restraint on the news media which can also be used as substitutes for trial closure. In addition to the alternatives already mentioned, the *Nebraska Press* Court raised the possibility that prejudice could be guarded against by "searching" voir dire questions from the trial judge[111] and by "the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court."[112] These measures should adequately preserve the civil litigant's interest in an unbiased jury.

b. The litigant's interest in having an unbiased judge: The courts have acknowledged that news reports of a particular crime might lead to the application of political pressure on a

104. *See, e.g.*, Burnett v. National Enquirer, 7 Media L. Rptr. 1321 (Cal. Super. Ct. 1981). In the highly-publicized *Burnett* case, the defendant *Enquirer* moved for a mistrial after entertainer Johnny Carson publicly "blasted" (to use the trial judge's words) the periodical on the Tonight Show during the time of the trial of the entertainer Carol Burnett's libel action. Although the motion for mistrial was denied by the trial judge (*id.* at 1322), the case illustrates that civil cases are as vulnerable to outside media influences as criminal cases.

105. The possibility that the presence of a large number of reporters would influence the jury in the Oakland Raiders' suit against the National Football League prompted the NFL attorneys to ask the trial judge to limit the number of reporters to a pool of five. Los Angeles Daily Journal, Mar. 3, 1982, § 2, at 1, col. 1.

106. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333; Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 581.

107. 448 U.S. at 581.

108. Sheppard v. Maxwell 384 U.S. at 358-63.

109. *Id.* at 363.

110. 427 U.S. 539.

111. *Id.* at 564.

112. *Id.*

criminal trial judge.[113] The mere presence of a large crowd in the courtroom might sway certain judges towards the making of politically expedient decisions. It is conceivable that similar pressures could arise as a result of news coverage of a civil trial.[114] An alternative to trial closure in order to cope with this problem is continuance of the case until after an impending judicial election.[115] In extreme cases, the contempt power might be used to discourage attempts by the press to influence a particular judge.[116] Also, the litigant's interest in having an unbiased judge is not necessarily in conflict with the interest of the public and press in attending trials. As mentioned above, the possibility of public disclosure of a judge's actions by the media may in fact provide the judge with incentive to stay honest, fair and competent.[117]

c. The litigant's interest in effective counsel: The argument has also occasionally been advanced that press presence and activity in the courtroom can have an adverse effect on counsel.[118] Extensive press coverage of a trial may interfere with privileged attorney-client communications, distract and inhibit counsel or lead a lawyer to use the publicity to advance his own interests over those of his client.[119] Less drastic means for

113. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941); Sheppard v. Maxwell, 384 U.S. at 342; Estes v. Texas, 381 U.S. at 548-49.

114. Consider the political pressure applied to California Superior Court Judge Egly in the Los Angeles school desegregation busing case. *See, e.g.*, Los Angeles Times, March 15, 1981, at 1, col. 5.

115. Sheppard v. Maxwell, 384 U.S. at 354 n.9.

116. Justice Frankfurter defended use of this measure in his dissenting opinion in Bridges v. California, 314 U.S. at 300. Part of the *Bridges* case involved publication of three editorials by the *Los Angeles Times* critical of the defendants in three different criminal actions, two of which arose out of labor disputes and the third involving a woman "political boss." *Id.* at 272 n.17, 274 n.19. The editorials were published following the conviction of, but prior to the sentencing or probation hearings for, the defendants. The most extreme editorial stated: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill." *Id.* at 272 n.17. The newspaper publisher and managing editor were cited for contempt and fined for publishing the editorials.

The contempt convictions were, however, successfully challenged on federal constitutional grounds. Reversing the California courts, the *Bridges* majority made it clear that the possibility of the publicity's influence on the judge "must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263.

117. See text accompanying notes 84-86, *supra*.

118. *See, e.g.*, Estes v. Texas, 381 U.S. at 549; Sheppard v. Maxwell, 384 U.S. at 344.

119. See note 118, *supra*.

preserving a litigant's interest in effective counsel would be to limit, rather than totally prohibit, press activity at trial.[120] Thus, the *Sheppard* Court suggested that restrictions on the number of reporters and on their ability to move around inside the courtroom bar might enhance counsel effectiveness by preserving the bar as a place "reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and counsel."[121]

d. The litigant's interest in accurate testimony from all possible witnesses: Presence of the public and press at a trial can sometimes inhibit and intimidate witnesses, keeping them from testifying accurately or from coming forward at all.[122] This problem may arise because of the particularly sensitive character of the testimony or witness,[123] as where the witness is a child, or when the potential witness must fear for his safety if his identity and the nature of his testimony become public knowledge.[124] An open trial may also detract from the accuracy of testimony where a particular witness is inclined to exaggerate and overdramatize the facts before a large courtroom audience.[125] Witnesses may also be unduly influenced by the testimony of others read in a newspaper or heard on the evening news.[126]

As with the issues previously discussed, the interest of the

120. 384 U.S. at 357-63.

121. *Id.* at 355, 358.

122. *See, e.g.*, Des Moines Register & Tribune Co. v. Hildreth, 181 N.W.2d 216, 219-20 (Iowa 1970). Note that the Iowa court did not accept this reason as adequate to justify closure of the trial. *Id.* at 220.

123. *See, e.g.*, State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1966). The problem is compounded where the witness is a child. *E.g.*, State v. Gionfriddo, 154 Conn. 90, 221 A.2d 851 (1966). The possibility of trial closure because of the sensitive nature of particular testimony can arise in civil trials such as divorce cases. *E.g.*, Whitney v. Whitney, 164 Cal. App. 2d 577, 582, 330 P.2d 947 (1958) (construing CAL. CIV. PROC. CODE § 125 (West) (repealed 1970)). See text accompanying notes 168-176, *supra*.

124. *See, e.g.*, United States v. Hernandez, 608 F.2d 741, 746-48 (9th Cir. 1979). It is less likely that this problem will arise in the context of a civil trial since a party's life or liberty is generally not at stake. However, the possibility remains that witness intimidation may be attempted in an important civil suit. Partial trial closure might be sought in such circumstances to protect the litigants' interest in hearing all available witnesses.

125. *See* Estes v. Texas, 381 U.S. at 547. Although the *Estes* Court dealt specifically with the impact of television cameras on witnesses, the plurality acknowledged that some of the same problems may also occur in trials covered heavily by newspapers. *Id.* at 548.

126. *Id.* at 547; Sheppard v. Maxwell, 384 U.S. 333.

litigant in procuring accurate testimony from all available witnesses can often be protected by measures other than trial closure. These alternatives have usually been developed in criminal cases but can be applied in civil trials as well. "Sensitive" testimony, such as that concerning sexual behavior, should rarely lead to closure of modern courts since the public is, on the whole, increasingly mature and used to dealing with sexual matters in a frank and open way.[127] Embarassment of an adult witness is usually not a sufficient reason to close the courtroom to the public.[128] Discriminate exclusion by the judge of those spectators prone to tactless reactions can ease a witness's embarassment and thus improve his or her testimony.[129] Juvenile witnesses can be protected and encouraged to testify by orders prohibiting the press from printing their names.[130]

When a witness appears to over-dramatize testimony in order to please a large courtroom audience, judicial limitation on the extent of press activity, such as exclusion of broadcast media or limitation on the number of newspaper reporters, may

127. As the public discards more and more of the modesty of earlier eras, this justification for trial closure will have less importance. Judicial notice of the worldly nature of modern Americans led the court in United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949) to conclude:

> [W]hatever may have been the view in a earlier and more formally modest age, we think that the franker and more realistic attitude of the present day [public] towards matters of sex precludes a determination that all members of the public, the mature and experienced as well as the immature and impressionable, may reasonably be excluded from the trial of a sexual offense upon the ground of public morals.

128. State v. Schmit, 273 Minn. at 85, 139 N.W.2d at 806. The *Schmit* court stated:

> Mere embarassment of adult witnesses with no showing of inability to testify is not a sufficient reason to defeat such an over-balancing constitutional right. [The criminal defendant's Sixth Amendment right to a public trial.] The order and decorum of the court, undoubtedly endangered by the presence of prurient-minded or sensation-seeking spectators, can usually be maintained by the vigilant exercise of the trial judge's authority as well as by indiscriminate exclusion.

Where the witness's embarassment makes him unable to testify at all, temporary trial closure may be appropriate. *See, e.g.*, Kirstowsky v. Superior Court, 143 Cal. App. 2d 745 (1956).

129. Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944); *but see* Lexington Herald Leader Co. v. Tackett, 601 S.W.2d 905 (Ky. 1980).

130. *See, e.g.*, Brian W. v. Superior Court, 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978). The validity of such orders under the United States Constitution is in some question following the decision in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), which held that the First Amendment prohibited the imposition of criminal penalties on a newspaper for publishing the lawfully-obtained name of a juvenile criminal defendant without court permission.

alleviate the problem.[131] The influence of news coverage of earlier testimony on later witnesses may be resolved by sequestration of the witnesses.[132] Full trial closure, even for a short time, should be necessary only where the above alternatives clearly do not adequately ensure accurate testimony.

e. The litigant's interest in a courtroom free of distuption: Past experiences in celebrated criminal cases have shown that unchecked press activity in a courtroom can undermine the orderly atmosphere necessary for a fair trial.[133] This problem is not fundamentally different in civil and criminal trials, and the solutions developed in the criminal cases should also be effective in civil cases. Judicial restriction of the manner and amount of press and public activity in the courtroom is the simple alternative to full trial closure.[134] Plainly, the issues which arise when a party's interest in a fair trial is in conflict with the public's interest in an open trial are largely identical in civil and criminal trials. Alternatives to full trial closure for the protection of the litigant's interest in a fair trial have been developed to deal with most situations and can be equally effective in civil and criminal trials.

2. *The Litigant's Interest in Privacy*

One area of distinction between civil and criminal trials may be the degree of privacy which parties to each type of proceeding can reasonably expect. A civil litigant's constitutional right of privacy may present a formidable obstacle to the formalization of a constitutional public right to attend civil trials.[135] Ar-

131. Estes v. Texas, 381 U.S. at 547-48.

132. Sheppard v. Maxwell, 384 U.S. at 359.

133. *See id.* at 342-45. The problems can be exacerbated when the broadcast media are present in the courtroom. See cases cited note 16, *supra*.

134. The *Sheppard* Court made some specific suggestions along these lines:

> The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court . . . Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen . . . The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

Id. at 358.

135. The right of privacy constitutionalized in Griswold v. Connecticut, 381 U.S. 479

guably, the civil litigant has a greater right of privacy than does the criminal defendant due to the nature of the proceedings. A criminal defendant is accused of a crime against society as a whole; "the State" or "the People" are always a party to criminal trials.[136] Civil litigation, on the other hand, often only involves private parties and private disputes of little interest to society at large. Some civil proceedings, such as divorce actions, juvenile proceedings, other family law matters, will contests where capacity is an issue, and personal injury actions in which extensive medical records are presented, are particularly sensitive, arguably demanding recognition of greater privacy rights for the litigants.[137]

While the litigant's constitutional right of privacy has not been expressly recognized by the United States Supreme Court as a factor in deciding the public trial issue,[138] the conflict between privacy rights and freedom of speech and of the press has been extensively discussed in other contexts.[139] The usual way for a person to enforce his interest in privacy is by

(1965), like the right of public access to criminal trials recognized in *Richmond*, is not expressly stated in the First Amendment. Both rights are "implicit", to be found in what Justice Douglas described as the "penumbra" of the First Amendment. *Id.* at 484. Later decisions leave the exact constitutional source of the privacy right in doubt, the latest pronouncement indicating that it is founded in the "Fourteenth Amendment's concept of personal liberty." Roe v. Wade, 410 U.S. 113, 153 (1973). Both rights would seem to be of equal weight, although no court has reached this issue. The open trial is, however, part of an older tradition than is the relatively recently-developed right to privacy. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 802-04 (4th ed. 1971) for a short history of the common law right of privacy. On the other hand, the right of privacy was recognized as a constitutional right several years before the establishment of the right of access to criminal trials in 1980. This note will assume that both rights will be treated by the courts as having equal legal significance and weight.

136. See note 72, *supra*.

137. In recognition of the sensitive nature of some types of civil proceedings, many states provide for mandatory or discretionary exclusion of the public and press in some circumstances. See notes 168-74, and accompanying text, *infra*. Certain criminal proceedings may also involve highly sensitive issues. Testimony in rape cases may be as sensitive as allegations of physical abuse or infidelity in divorce actions. Criminal insanity hearings are equally as sensitive as civil trials where capacity is an issue. Prior to *Richmond*, these kinds of criminal proceedings were occasionally closed to the public and press. *E.g.*, State v. Gionfriddo, 154 Conn. 90, 93, 221 A.2d 851, 852 (1966); N.Y. JUD. LAW § 4 (McKinney). The existence of these sensitive issues did not, however, prevent the United States Supreme Court from finding a right of access to criminal trials.

138. The Court in *Sheppard*, 384 U.S. at 344, did refer in a general way to the imposition by the press on the defendant's privacy, but without discussion of the Constitutional ramifications.

139. See notes 141-50 and accompanying text, *infra*.

an action in tort.[140] Such actions have sometimes precipitated the conflict between the individual's interest in privacy and the public's interest in free speech and press.[141] The way the Supreme Court has resolved this conflict in invasion of privacy actions may reveal how the Court will resolve the conflict between the same interests in the public trial issue.

Time, Inc. v. Hill[142] held that the press protections developed in *New York Times Co. v. Sullivan*,[143] which made it more difficult for a public figure plaintiff to prevail in a defamation action,[144] also apply to invasion of privacy actions. Subsequent litigation of the "public figure" issue[145] indicates that mere participation in a legal proceeding does not automatically lead to reduced protection against defamation and invasion of privacy.[146] One conclusion that may be drawn from this line of cases is that an individual does not discard his right of privacy when he enters the courtroom as a litigant.

The case of *Cox Broadcasting Corp. v. Cohn*[147] is particularly revealing of the way the Court resolves the conflict between privacy rights and free speech and press rights. In *Cox*, the issue raised was whether the broadcast of a deceased rape victim's name in violation of a state statute constituted an actionable invasion of privacy despite the First Amendment freedom of press clause.[148] Because the victim's name was a matter of public record in *Cox*,[149] the issue of whether an individual's

140. *See* W. PROSSER, *supra* note 135, at 802-15.

141. *E.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

142. 385 U.S. 374 (1967).

143. 376 U.S. 254 (1964).

144. *New York Times* requires a public figure plaintiff to show the defendant acted with "malice" in order to prevail. *Id.* at 279-80.

145. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

146. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976). In this regard, the Court stated:

> The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times* [citation omitted]. And while participants in some litigation may be legitimate 'public figures,' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the state or by others. *Id.* at 457.

See also Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir.), *cert. denied*, 100 S. Ct. 1342 (1980); *But see* Orr v. Argus-Press, 586 F.2d 1108, 1116 (6th Cir.), *cert. denied*, 440 U.S. 960 (1978).

147. 420 U.S. 469 (1975).

148. *Id.* at 471.

149. *Id.* at 472-73.

privacy interest can prevent a judicial proceeding from becoming a public matter in the first place was not reached. Nonetheless, *Cox*, by holding that publication of the victim's name was protected by the First Amendment,[150] illustrated that freedom of speech and press interests can in some circumstances override an individual's right of privacy. In summary, for purposes of this aspect of the public trial question, *Cox* and the defamation cases demonstrate that while a litigant may retain some privacy rights at trial, they can be subordinated to the public's free speech and press interests.

3. *Litigant's Interest in Secrecy*

In addition to an interest in privacy, individual litigants may in some circumstances have an interest in keeping certain information and communications secret. Whether this interest has any connection to the right of privacy is uncertain, and consequently so is its status as a constitutionally-protected right.[151] Trial closure, though, is one means of preserving secrecy. This issue most often arises in litigation involving trade secrets.[152] Protection of trade secrets can be an issue in criminal contempt proceedings as well as civil litigation,[153] and there is some indication that the Supreme Court considered this individual interest in establishing the First Amendment right of access in *Richmond*.[154] Since the existence of criminal actions

150. *Id.* at 494-95.

151. Those statutes and decisions authorizing trial closure arguably are sometimes necessary to give effect to federal copyright and patent laws, passed under the authority of article I, section 8 of the United States Constitution. It could therefore be argued that a competing consideration arises where the public demands a right to hear a trade secret trial.

U.S. CONST. art. I, § 8, cl. 8 reads "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ." To the author's knowledge, this theory has not been advanced in any case to date. However, it has not yet been necessary to do so since the right to attend has never before been elevated to a constitutional level.

The conflict between constitutional copyright and patent protection has been manifested in another context: some writers have argued that copyright protection can infringe on First Amendment freedom of speech and press provisions. *See generally* Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320 (1979).

152. *See generally* Annot., 62 A.L.R. 2d 509. Trials involving national secrets can also raise the possibility of a closed hearing. This issue is far more likely to arise in a criminal action than a civil one. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 714-16 (1975).

153. *E.g.*, Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974).

154. 448 U.S. at 600 n.5. Justice Stewart wrote: "The preservation of trade secrets

involving trade secrets did not preclude a finding of a public right to attend criminal trials, it seems unlikely that the need to protect trade secrets would preclude the establishment of an equivalent right to attend civil trials.[155]

V

Forecast: A Right to Attend Civil Trials on the Constitutional Horizon?

If the Supreme Court chooses to address the issue of public access to civil trials, several different courses are available to it. The Court may flatly refuse to recognize a constitutional right to attend civil trials because it finds some fundamental distinction between civil trials which requires a result opposite from that reached in *Richmond*. Or, the Court may deal with the problem on an *ad hoc* basis: deciding that one particular civil trial judge was justified in his exclusion of the public from the court on the facts of the particular case, while in another case deciding that the judge's exclusion of the public was unwarranted for some reason. Alternatively, the Court may refuse to examine the issue in terms of *all* civil actions, instead developing a different analysis, and possibly a different rule, for each general type of civil action. Finally, the Court may take an approach similar to the one taken in *Richmond*: recognizing a broad general rule that the public and press have a constitutional right to attend all civil trials, while leaving the development of possible exceptions to the general rule for later decisions. In light of the recent use of the latter approach in *Richmond*, this note will restrict further speculation to an attempt to answer whether or not the Court is likely to follow a similar course in regards to civil trials; that is, whether the Court is likely to recognize a general First Amendment right of the public to attend civil trials.

There does not seem to be any issue which would preclude Supreme Court recognition of a constitutional right to attend civil trials. Since the historical openness of criminal trials provided the *Richmond* Court with a basis for the creation of a right of access, the parallel tradition of open civil trials[156] may

. . . might justify the exclusion of the public from at least some segments of a civil trial." *Id.*

155. See text accompanying notes 185-86, *infra*.

156. See text accompanying notes 54-68, *supra*.

compel an extension of *Richmond* to that sphere. At one time or another, all of the justices on the *Richmond* Court have acknowledged the importance of the public civil trial tradition.[157] Although only Justice Stewart has expressly stated that there is a First Amendment right of access to civil trials,[158] these other statements indicate that at least some of the other justices may be willing to join Justice Stewart. For example, in his concurring opinion in *Richmond*, Justice Brennan clearly contemplated civil as well as criminal trials in discussing the right of access.[159] Delineating the important interests served by public trials, he twice referred to these interests in the context of civil proceedings.[160]

One of the difficulties which prevented the *Gannett* Court from holding that the public has a Sixth Amendment right to attend a criminal pre-trial hearing was the lack of an historical basis for limiting public access exclusively to criminal cases.[161] This posed a problem since the Sixth Amendment clearly relates only to criminal proceedings.[162] In rejecting the assertions by Gannett Co. attorneys that there was such a Sixth Amendment right, the Court revealingly stated:

> If the existence of a common-law rule were the test for whether there is a Sixth Amendment public right to a public trial, . . . there would be such a right in civil as well as criminal cases . . . . In short, there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.[163]

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157. See quotation from *Gannett*, note 67, *supra*. Most of the *Richmond* opinions expressly or impliedly reiterated the Court's recognition of the commonlaw tradition of open civil trials. See note 68 and accompanying text, *supra*. In *Richmond*, Justices Brennan and Marshall acknowledged the historical openness of the civil trial when they quoted the following statement written by Justice Blackmun in *Gannett*: "[T]here is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history." 448 U.S. at 590. That Justice Stewart was referring to civil as well as criminal trials in his statement that "it has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials." (*Id.* at 599) is evident from his earlier conclusion that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* (footnote omitted).

158. 448 U.S. at 599.

159. *Id.* at 596.

160. *Id.* See also note 157, *supra*.

161. 443 U.S. at 385-86 n.15.

162. U.S. CONST. amend. VI reads in part as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

163. 443 U.S. at 386 n.15.

Unlike the Sixth Amendment,[164] there is nothing in the "text and structure" of the First Amendment which restricts its application to criminal proceedings.[165] Since the existence of the common law rule became a major test for finding a First Amendment public right of access in *Richmond*, the logic of the lead opinion in *Gannett* seems to compel a finding of the same right for civil cases.

The Court has already sanctioned means of protecting individual interests which are less drastic than full trial closure lessening the chance that individual interests will persuade the Court not to recognize a public right of access to civil trials. If the Court chooses to hear a case raising the issue, it is thus very likely the Court will establish a First Amendment public right to attend civil trials.

VI
Impact of a Public Right to Attend on Future Civil Trials

Although the recognition of a First Amendment right to attend is not a foregone conclusion, it seems probable. An examination of the impact that such a decision might have is therefore worthwhile. Since civil trials are already open to the public in most jurisdictions,[166] elevating this tradition to a constitutional level will not cause any great change in most circumstances. However, many jurisdictions also recognize exceptions to the public trial norm.[167] In determining what impact an expansion of *Richmond* might have, it is necessary to determine whether any of the currently recognized exceptions will remain viable in the face of a constitutinal right to attend.

A. Currently Recognized Exceptions to the Open-Trial Rule

Throughout Anglo-American judicial history, the public and press have often been excluded from particular types of civil proceedings and in cases having certain common sets of circumstances.[168] These situations can be seen as instances in

164. See note 162, *supra*.

165. The applicable portions of U.S. CONST. amend. I read: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

166. See notes 64-66 and accompanying text, *supra*.

167. See text accompanying notes 168-86, *infra*.

168. *See generally* Annot., 79 A.L.R. 3d 401-09; E. JENKS, THE BOOK OF ENGLISH LAW

which the individual interests promoted by trial closure outweigh the interests served by public attendance. In many states, judges are authorized to close certain family law proceedings.[169] For example, many states give trial judges the power to close divorce or dissolution proceedings to the public.[170] A judge's power to close civil trials has also been recognized when children are parties, witnesses, or otherwise intimately involved in a case, as indicated by numerous statutes which provide for closure of adoption,[171] custody,[172] or civil paternity[173] hearings. Other states have statutes or court rules which give a trial judge broad powers to exclude the public and press in any kind of family law case where the welfare of a child might otherwise be jeopardized.[174] Controversy has already arisen in some child custody cases where the trial judge has conducted a private *in camera* interview with the child.[175] These cases have focused on whether the due process rights of the parents have been violated by the interview.[176] Establishment of a constitutional right on the part of the public to attend civil trials would add an additional factor for a judge to consider in such cases, and might tip the balance against

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74 (6th ed. 1967). In addition to those hearings discussed in the text accompanying notes 168-97, *infra*, other closed proceedings of interest to the legal profession include disciplinary hearings for attorneys and judges. For a discussion of secret judicial hearings see Note, *Behind Judicial Robes*, *supra* note 85. For an example of state court approval of closed attorney disciplinary hearings, see Philadelphia Newspapers, Inc. v. Disciplinary Board of Supreme Court, 468 Pa. 382, 363 A.2d 779 (1976).

These proceedings are beyond the scope of this note and thus mentioned only briefly here because they are not formal trials, and are not easily categorized as either civil or criminal in nature. *E.g.*, *In re* Crutchfield, 289 N.C. 597, 602, 223 S.E.2d 822, 825 (1975).

169. See notes 171-174, *infra*.

170. State *ex rel.* English v. McCrary, 328 So. 2d 257 (Fla. Dist. Ct. App. 1976); IDAHO R. CIV. P. 77(b); IOWA CODE ANN. § 598.8 (West 1975); N.Y. JUD. LAW § 4 (McKinney 1968); UTAH CODE ANN. § 78-7-4 (1953).

171. *E.g.*, CAL. CIV. CODE § 226m (West 1954); FLA. STAT. ANN. § 63.162 (West Supp. 1982); HAWAII REV. STAT. § 578-15 (1976).

172. *E.g.*, COLO. REV. STAT. § 14-10-128 (1973); IOWA CODE ANN. § 598.8 (West 1975); N.J. STAT. ANN. 9:2-1 (West 1976); UNIF. MARRIAGE & DIVORCE ACT § 406 (1971).

173. *E.g.*, D.C. CODE ANN. § 16-2344 (1981); HAWAII REV. STAT. § 584-20 (1976); NEB. REV. STAT. § 13-112 (1975); UNIF. PARENTAGE ACT § 20, 9A U.L.A. 612 (1979).

174. *E.g.*, CONN. GEN. STAT. ANN. § 46b-11 (West 1958); S.C. FAM. CT. R. 14.

175. *See* Annot., 99 A.L.R. 2d 954-965 (1965). This dispute arises where a judge hearing a child custody matter conducts a private interview with the child involved. Not only is the public excluded in this situation, but one or both of the parents are not allowed to be present. These circumstances have frequently led to challenge on appeal by the party or parties excluded from the interview; courts are split on the propriety of the judge's action. *Id.*

176. *See, e.g.*, Jenkins v. Jenkins, 125 Cal. App. 2d 109, 269 P.2d 908 (1954).

trial closure.[177]

In addition to "true" civil proceedings involving children, a majority of American jurisdictions consider all matters brought before the juvenile courts to be civil in nature, even where the youth involved is accused of acts which would constitute crimes in adult court.[178] When a minor is accused of such acts, the state's interest in rehabilitation of the juvenile often mandates confidentiality.[179] Closure of the trial is only one of the methods available for preservation of confidentiality.[180]

In addition to family law hearings, trials where evidence to be presented is "vulgar" or "obscene" entitles judges in some states to exclude the public from the courtroom.[181] In such cases, general exclusion of the public and press in order to protect public morals has been criticized by some courts because of the relatively sophisticated nature of the present-day American public.[182] Accordingly, some states limit a judge's power in these cases to the ability to clear the court of minors only.[183] While protection of the public may not justify trial closure in these circumstances, the privacy interests of the parties or protection of a sensitive and reluctant witness, together with the need for complete and accurate testimony, may require a judge

177. Note that the plurality was critical of the trial judge in the *Richmond* case because "no recognition of any right under the Constitution for the public or press to attend the trial" was made. 448 U.S. at 581.

178. *See In re* Lewis, 51 Wash. 2d 193, 198-20, 316 P.2d 907, 910-11 (1957). Whether such "quasi-criminal" actions are covered by the *Richmond* decision is not clear at this time. If *Richmond* does not apply because of the technically "civil" nature of these actions, the conflict between closed juvenile proceedings of this kind and a public right of access must be addressed at some future time.

179. *See generally* Cohen, *Reconciling Media Access with Confidentiality for the Individual in Juvenile Court*, 20 SANTA CLARA L. REV. 405 (1980). The conflict between the free press and the state's interest in juvenile rehabilitation has been extensively discussed with regard to cases where confidentiality is preserved by prohibiting the publication of the alleged offender's name. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Note, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471 (1980).

180. *See* Cohen, *supra* note 179. *Cf. In re* Robert M., 439 N.Y.S. 2d 986 (1981); *In re* Lewis, 51 Wash. 2d 193, 316 P.2d 907 (1957). A less drastic and more common means for preserving confidentiality is a proscription against disclosure of the juvenile's name. *See generally* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

181. *E.g.*, ALA. CODE § 12-21-9 (1975); GA. CODE ANN. § 81-1006 (1956).

182. See note 127, *supra*.

183. *E.g.*, MINN. STAT. ANN. § 546.37 (West 1971); WISC. STAT. ANN. § 256.14 (West 1971). *See also* MASS. GEN. LAWS ANN. ch. 220, § 13 (West 1958); ME. REV. STAT. ANN. tit. 14, § 1401 (1964) (giving the trial judge the power to exclude minor spectators from all types of trials).

to exclude the public and press.[184]

Judges have also closed trials to the public and press when litigation involves trade secrets.[185] Trial closure in these circumstances is not ordered for the protection of a personal privacy interest but for the protection of an economic interest in a secret manufacturing process or chemical formula. Although there has been little discussion of the rationale behind trial closure in this situation, the same policies which favor the evidentiary trade secret privilege[186] necessitate exclusion of the public and press in these cases.

Although given the power, the courts have been reluctant to close trials. This reluctance has been based on state constitutional grounds[187] and the common law tradition of public trials.[188] Still, it is not difficult to imagine circumstances in a trial involving minors where the state's interest in the welfare of children, together with the child's own interests and those of his parents, could outweigh the public interests served by an open trial.[189] In addition, a strong argument may be advanced for the proposition that an adult's privacy interest overshadows the public interests in divorce, paternity, and other domestic relations cases.[190] It is rare that the public at large has any legitimate reason, except for the general purposes served by

184. See text accompanying notes 122-32, *supra*.

185. Gai Audio of New York, Inc. v. Columbia Broadcasting System, 27 Md. App. 172, 197, 340 A.2d 736, 751 (1975); Taylor Iron & Steel Co. v. Nichols, 73 N.J. Eq. 684, 69 A. 186 (1908); Annot., 62 A.L.R. 2d 509 (1958). *See also* CAL. EVID. CODE § 915(b) (West 1954). Trade secrets can also be involved in criminal actions. See note 153, *supra*.

186. *See, e.g.*, 8 WIGMORE, EVIDENCE § 2212 (McNaughten rev. ed. 1961); CAL. EVID. CODE § 1060 (West 1954).

187. State *ex rel.* Oregonian Publishing Co. v. Deiz, 289 Or. 277, 613 P.2d 23 (1980). *Cf. In re* Lewis, 51 Wash. 2d 193, 316 P.2d 907 (1957).

188. *See* Raper v. Berrier, 246 N.C. 193, 97 S.E.2d 782 (1954).

189. *See, e.g.*, Hassler v. District of Columbia, 238 F.2d 264 (D.C. Cir. 1956); Rea v. Rea, 195 Or. 252, 258, 245 P.2d 884, 886 (1952). *But see* State *ex rel.* Oregonian Publishing Co. v. Diez, 289 Or. 277, 613 P.2d 23 (1980). Criminal trials can also involve a juvenile as a witness. See notes 197-98 and accompanying text, *infra*. A complete discussion of all the special issues which arise in regard to publicity of proceedings involving juveniles is not possible here. This note merely seeks to draw attention to potential problems which may arise in this area if a constitutional right to attend civil trials is recognized.

190. *See, e.g.*, State *ex rel.* Gore Newspapers Co. v. Tyson, 313 So. 2d at 789-90 (Walden, J., dissenting) where the dissenting judge expressed his concern that "any busybodies seeking tid bits for bridge table or locker room gossip" could attend a divorce trial if an unlimited right of access is recognized.

At least one court has recognized an additional factor to be considered in the issue of public presence at divorce trials: the *state's* interest in perpetuating the marital relationship. *Id.* at 784. This interest did not prevent the *Gore* court from restraining the trial judge from closing the proceedings.

all open trials, to hear the merits of a domestic relations case.[191] When considered with the need to protect trade secrets and national security, it is apparent that it will be necessary to give continued recognition to *some* exceptions to any public civil trial rule.

The *Richmond* court made it clear that the right to attend criminal trials is not absolute and will be subordinated to "overriding interests."[192] The same qualification could, and probably would, be made to any public right to attend civil trials. Further litigation would then be necessary to determine which interests are "overriding". More specifically, the courts would be required to determine on a case-by-case basis what interests and circumstances require trial closure despite the constitutional preference for open trials. It may be found that the interests protected by some or all of the traditional exceptions are "overriding interests" within the meaning of *Richmond*.

The *Richmond* decision indicates that such a solution is contemplated by the Court. For example, in his concurring opinion, Justice Stewart specifically mentioned the trade-secrets exception, indicating that it would remain viable following *Richmond*.[193] Justice Stewart also noted that a criminal trial might still be closed during the testimony of a youthful witness.[194] The concurring opinion of Justice Brennan, joined by Justice Marshall, suggests a possible exception to the open trial where national security interests are involved in litigation.[195] The plurality also suggested the possibility of limiting public attendance for preservation of courtroom order.[196]

Some clarification of the exceptional circumstances that will justify criminal trial closure may be forthcoming. The Court has noted probable jurisdiction in *Globe Newspaper v. Supe-*

191. Although not actually a divorce case, the celebrated case of Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976) is one notable exception. Although the legitimacy of public interest in every intimate detail of the relationship between Mr. and Ms. Marvin is questionable, the larger issues raised by the dispute concerning the property rights of unmarried couples who live together, in some ways inseparable from the details, were of unmistakable social importance.

192. 448 U.S. at 581-82 n.18.

193. *Id.* at 600 n.5 (Stewart, J., concurring).

194. *Id.*

195. Id. at 598 n.24 (Brennan, J., concurring). Michigan makes its public court statute inapplicable to cases involving national security. MICH. COMP. LAWS ANN. § 600.1420 (1981).

196. 448 U.S. at 581-82 n.18.

rior Court,[197] which involves closure of a criminal trial during testimony by a juvenile rape victim. The trial judge's actions were twice upheld by the Massachusetts Supreme Court.[198] *Globe* represents an opportunity for the United States Supreme Court to more fully examine and define the circumstances which will allow a trial judge to exclude the public and press from a trial. Since the *Globe* trial was closed to protect a minor, the Court specifically has the opportunity to explore the extent to which a child's interests may outweigh the public's right to attend criminal trials. If the Court chooses to issue such an opinion, it will have broad implications for the many civil proceedings involving children, and may provide some guidance to trial judges asked to exclude the public in those cases.

B. Validity of Current State Closure Rules

It is necessary to examine a particular statute or judicial rule allowing a trial closure in order to predict whether it would remain constitutionally valid following an extension of the *Richmond* holding to civil trials. The state rules creating open-trial exceptions are of two basic types: discretionary and mandatory.

The first type of rule gives a trial judge discretionary power to exclude the public and press from the courtroom. Within this broad category, there are many statutory variations. For example, some states give a trial judge broad discretionary authority to close any kind of civil trial,[199] while others restrict

197. — Mass. —, 423 N.E.2d 723 (1981), *prob. jurisdiction noted*, No. 81-611.

198. The Massachusetts supreme court affirmed the trial judge's actions prior to the U.S. Supreme Court's decision in *Richmond*. — Mass. —, 401 N.E.2d 360 (1980). This case has been referred to as *"Globe I."* The case was appealed to the U.S. Supreme Court, who remanded to the Massachusetts court for another review in light of *Richmond*. 449 U.S. 894 (1980). The Massachusetts court again upheld the trial judge's closure of the trial in its 1981 *Globe II* decision. — Mass. —, 423 N.E.2d 723 (1981).

199. *E.g.*, PA. R. CIV. P. § 223. The Pennsylvania rule states in relevant part:

> (a) Subject to the requirements of due process of law and of the constitutional rights of the parties, the court may make and enforce rules and orders covering any of the following matters, *inter alia*: . . . (4) Regulating or excluding the public or persons not interested in the proceedings whenever the court deems such regulation or exclusion to be in the interest of the public good, order or morals.

Although the statute makes the judge's power subject to the constitutional rights of the parties, there is no express requirement that the judge consider the constitutional rights of the public to attend the trial.

this broad power to chancery courts,[200] and still others bestow discretionary power only in particular types of proceedings.[201] Typically, a state restricts its judges' discretionary power to divorce actions, child custody hearings, or any actions where children are involved.[202]

The discretionary rules do not appear to be entirely incompatible with *Richmond* since a presumption of openness is implied; some reason for trial closure is usually required.[203] However, within this general type of rule, the amount of discretion given to a trial judge varies greatly.[204] A rule giving a judge too much discretion may not satisfy the "overriding interest" requirement of *Richmond*.[205] Also, the closure of a particular trial in a jurisdiction operating under a valid discretionary closure rule may fail to survive a constitutional challenge if the judge's reasons for excluding the public or press are not "articulated in findings"[206] or do not show the existence of "overriding interests."[207] Thus, while the basic legislative rule may be constitutional, litigation may still proliferate regarding particular exercises of judicial discretion in application of the rule.

The second type of rule makes trial closure mandatory for certain kinds of proceedings. Proceedings where closure is mandatory in many states include adoption hearings[208] and

200. *E.g.*, ARK. STAT. ANN. § 22-404.1 (1962); DEL. CODE ANN. tit. 10, § 344 (1974). The Delaware statute reads: "All jurisdiction and powers of the Court of Chancery may be exercised in chambers."

201. See notes 170-171 & 174 *supra*.

202. The New York statute is typical: "[I]n cases for divorce . . . the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court." N.Y. JUD. LAW § 4 (McKinney 1968).

203. The language in *Richmond* suggests that the First Amendment in effect creates a presumption of openness, with the burden of showing the existence of an "overriding interest" on the party seeking to close the trial. This would seem to follow from the statement that, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." 448 U.S. at 580 (footnote omitted).

204. For example, compare the broad authority given Pennsylvania trial judges in the statute quoted in note 199, *supra*, with the more restrictive New York statute in note 202, *supra*.

205. See note 203, *supra*.

206. *Id.*

207. *Id.*

208. See note 171, *supra*. CAL. CIV. CODE § 226m (West 1954) reads:

"All superior court hearings in adoption proceedings shall be held in private, and the court shall exclude all persons except the officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties under the laws governing adoptions."

civil paternity actions.[209] Juvenile court hearings are also frequently subject to mandatory closure.[210] Some states mandate closure of child custody hearings under certain circumstances.[211] Other states provide for mandatory exclusion of the public and press when requested by one or all of the parties.[212]

Rules of this type would probably be found constitutionally deficient under an extension of *Richmond* since they fail to require the trial judge to articulate his reasons for closing the trial in findings.[213] Such mandatory statutes would also be subject to constitutional attack on grounds that they are overbroad. Thus, some redrafting of statutes may be required if *Richmond* is extended.

An additional impact of an extension of *Richmond* would certainly be a decrease in local control over the standards governing trial closure. This was a major concern in Justice Rehnquist's *Richmond* dissent.[214] Under current law, the power to determine which circumstances authorize trial closure lies with the various state legislatures and courts. Establishment of a federal constitutional right will give the last word on this subject to the United States Supreme Court whenever trial closure is attacked. The loss of local control will be accompanied by greater national uniformity. Depending on whether the

209. See note 173, *supra*. UNIF. PARENTAGE ACT § 20, 9A U.L.A. 612 (1979) reads in relevant part:

"Notwithstanding any other law concerning public hearings and records, any hearing or trial held under this Act shall be held in closed court without admittance of any person other than those necessary to the action or proceeding . . . ."

210. *E.g.*, IDAHO CODE § 16-1813 (1979). The District of Columbia's mandatory juvenile court closure statute may forestall a constitutional attack by allowing admission of the public and press if they refrain from disclosing the identity of the juvenile involved. D.C. CODE ENCYCL. § 16-2316(e) (West 1966).

211. *E.g.*, N.J. STAT. ANN. 9:2-1 (West 1976), which states in relevant part:

> If the minor child or minor children have not, at the commencement of the action, reached the age of sixteen years, and if it is represented to the court by affadavit or under oath that evidence will be adduced involving the moral turpitude of either parent, or of such minor child or children, or that evidence will be adduced which may reflect upon the good reputation or social standing of the child or children, then the court shall admit to the hearing of such case only such persons as are directly interested in the matter being then heard.

212. *E.g.*, ARK. STAT. ANN. § 22-404.1 (1962); D.C. CODE ENCYCL. § 16-2344 (West Supp. 1970). The District of Columbia statute reads:

"Upon trial or proceedings over which the Division has jurisdiction under paragraph (3), (4), (10) or (11) of section 11-1101 [child support, custody, and paternity actions] the court may exclude the general public and, at the request of either party, shall exclude the general public."

213. See note 203, *supra*.

214. 448 U.S. at 604-06.

Supreme Court generally favors individual or public interests, new federal trial closure standards may be more or less stringent than the current rule in a given jurisdiction. Whether a local jurisdiction will be free to impose stricter requirements for trial closure than those mandated by the Supreme Court is questionable since this greater concern for public and press interests would reflect decreased sensitivity to the competing individual interests involved—some of which are also protected by the federal constitution. These issues will therefore have to be resolved by future litigation.

VII
Conclusion

It is probable that the *Richmond* public right to attend criminal trials will someday be extended to civil trials. Since civil trials have traditionally been open to the public, such a decision would probably not cause a great deal of disruption of or change in current practices. However, much litigation will undoubtedly be required to determine the circumstances under which a judge may still close the courtroom doors to the public and press. *Globe Newspaper v. Superior Court*[215] may mark the beginning of such litigation. Some existing state closure rules will also probably be declared unconstitutional. However, substantial change in current civil trial practice will be averted if the Supreme Court finds existing public trial exceptions to be constitutionally acceptable. It is hoped *Globe* will provide some help in this area. While an extension of *Richmond* may not cause any revolutions in trial practice, it should be welcomed by the press and public as an important step towards increasing recognition of constitutionally protected public access to governmental processes.

215. See notes 197-98 and accompanying text, *supra*.